

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEROME MCCOY : CIVIL ACTION
 :
 v. :
 :
 :
 MARTIN L. DRAGOVICH : No. 98-3493

MEMORANDUM AND ORDER

Norma L. Shapiro, J.

September 15, 1998

Petitioner Jerome McCoy, filing a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, alleged that the Pennsylvania Board of Probation and Parole ("Parole Board") violated his rights under the Due Process Clause of the Fifth Amendment and the Ex Post Facto Clause by arbitrarily and capriciously denying him parole. The petition for habeas corpus was referred to United States Magistrate Judge Diane M. Welsh ("Judge Welsh") for a Report and Recommendation. Judge Welsh recommended that the petition be dismissed for failure to exhaust state remedies.

In reaching this decision, Judge Welsh relied on Burkett v. Love, 89 F.3d 135 (3d Cir. 1996), in which the court held that a state prisoner must exhaust state remedies for unconstitutional denial of parole before seeking a federal writ of habeas corpus. See Burkett, 89 F.3d at 140-42. Noting that Pennsylvania state law was unclear on state appellate remedies available for denial of parole, the Burkett court invited

clarification by either the state Supreme or Commonwealth Courts.
See id. at 142.

The next year, the Pennsylvania Commonwealth Court issued two opinions rejecting the Third Circuit's interpretation of Pennsylvania law. In the first, the court found that "an appeal from the Board's decision would not be available because courts of this Commonwealth, like federal courts, are without jurisdiction to hear such appeals from the respective boards, even when a constitutional claim is made." Weaver v. Pennsylvania Board of Probation and Parole, 688 A.2d 766, 774 (Pa. Commw. 1997) (footnote omitted). The other decision, shortly after Weaver, refused to review a parole decision, "even when an error of constitutional proportion is averred." Commonwealth v. Stark, 698 A.2d 1327, 1333 (Pa. Commw. 1997).

In the most recent Pennsylvania Commonwealth Court decision, the court found that a parole decision was reviewable "to the extent that a constitutional or statutory violation has occurred." Myers v. Ridge, 712 A.2d 791, 794 (Pa. Commw. 1998).

Judge DuBois has found, on two occasions, that Pennsylvania did not afford appellate options for denial of parole decisions and dismissed the petitions on their merits. See Bonilla v. Vaughn, 1998 WL 480833, *5 (E.D. Pa. Aug. 14, 1998); Speth v. Pennsylvania Board of Probation and Parole, 1998 WL 272155, *2 (E.D. Pa. May 18, 1998). Judge Broderick also proceeded to the merits of a habeas petition and dismissed it,

but noted that state law was unclear. See George v. Vaughn, 1998 WL 188847, *2 (E.D. Pa. Apr. 21, 1998).

In the absence of a controlling Pennsylvania Supreme Court decision, or even a consensus of the Commonwealth Court judges, this court is bound by the Third Circuit's interpretation of Pennsylvania law. Judge Welsh correctly relied on the Burkett holding that state law remedies are available for the review of an unconstitutional parole violation and the petition should be dismissed without prejudice for failure to exhaust state remedies; her Report and Recommendation will be approved and adopted.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEROME MCCOY

v.

MARTIN L. DRAGOVICH

: CIVIL ACTION

:

:

:

: No. 98-3493

ORDER

AND NOW, this 15th day of September, 1998, after careful and independent consideration of the petition for a writ of habeas corpus and the answer thereto, and after review of the Report and Recommendation of United States Magistrate Judge Diane M. Welsh, and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;

2. The petition for a writ of habeas corpus is **DISMISSED** without prejudice.

J.